

אלא לחוב על מנת לזכות –

But rather to harm; provided their intention is beneficial

OVERVIEW

The גמרא cites the ruling of ר"ג א"ר and explains it, that when יתומים are prepared to divide their inherited estate, then בי"ד appoints for them an אפוטרופוס to act on their behalf for their benefit, and if the result was harmful to the יתומים, the יתומים must suffer the loss. תוספות distinguishes our case from a different גמרא which rules in a contradictory manner.

תוספות asks:

וקשה דאמר בפרק הניזקין (גיטין דף נב, א) –

And there is a difficulty; for the פרק הניזקין in ברייתא states -

דאין האפוטרופין רשאין לחוב ולזכות בנכסי יתומים –

That the אפוטרופין are not permitted to cause harm or benefit to the estate of the orphans -

ופריך התם לזכות אמאי לא ומשני לחוב על מנת לזכות –

And the גמרא there challenges this statement; why cannot the אפוטרופין benefit the orphan's estate?! And the גמרא there answered that the אפוטרופין may not cause them harm even if their intention was for their benefit.¹ This contradicts our גמרא which states that the אפוטרופוס has the power לחוב ע"מ לזכות, and there the גמרא maintains that they have no power לחוב ע"מ לזכות.

תוספות answers;

ויש לומר דהתם מיירי בתביעת חובות שיש לאחרים עליהם² –

And one can say; that there (in פרק הניזקין) the גמרא is discussing a case where others have claims against the יתומים -

ובהא ודאי אין רשאין³ דשמא לא יתבעום כשהן גדולים⁴ –

¹ The אפוטרופין acted on behalf of the יתומים for their benefit (they went to court to settle a claim) and it resulted in being harmful to the יתומים. The rule is that we disregard the actions of the אפוטרופין and the issue remains unresolved, and will be dealt with when the יתומים mature. The אפוטרופין do not have the power to cause harm to the estate of the יתומים. [If the result was beneficial to the יתומים then we allow the beneficial ruling.]

² Creditors of the father of the יתומים claim that the father owed them money and there is a lien on the estate.

³ The אפוטרופין are not permitted to be involved in this type of litigation; therefore if they were involved [illegally] and they lost the case, the יתומים do not suffer the loss, but rather we wait with the litigation until the יתומים mature.

⁴ There is nothing to be gained (from the perspective of the יתומים) by rushing to answer the litigation since it is possible that (eventually) the claimants will drop their case against the יתומים.

And in such an instance the אפטרופין are certainly not permitted to be involved, for perhaps the creditors will not demand payment when the יתומים mature.

אבל כשהן תובעין בשביל היתומים⁵ כי הכא בחלוקה דקרקעות –

However when the אפטרופסין are claiming on behalf of the יתומים as is the case here, regarding division of the land, in which instance -

דכי גדלי נמי צריכין לחלוק בהם⁶ ודאי מעמידין אפטרופוס לחוב על מנת לזכות:⁷

That when they will mature they will still need to divide, in such a case ע"מ will certainly appoint an אפטרופוס even if it לחוב as long as it is ע"מ לזכות.

SUMMARY

אפטרופסין may litigate when the יתומים are the claimants (and the decision is binding) but not when they are the respondents.

THINKING IT OVER

Why did not תוספות answer that in our גמרא it was the בי"ד who appointed the אפטרופוס (therefore they have the power of ע"מ לזכות), however in פרק הניזקין it was the father of the יתומים who appointed them?⁸

⁵ For instance the אפטרופוס claims that a certain (contested) property, which is currently in the possession of a stranger, belongs to the יתומים. Alternately the אפטרופוס claims that one child is entitled to more than what has been allotted to him (by another אפטרופוס).

⁶ This litigation will not disappear, for the יתומים want their rightful share of the estate.

⁷ The אפטרופוס is acting in good faith to protect the rights of the יתומים, therefore we must follow the results, good or bad, whatever the may be.

⁸ See בירורי השיטות (ד"ה ובריתב"א).